

Minutes of the Open Meeting Law Advisory Commission
June 18, 2013
100 Cambridge Street, Room 2B, Boston, MA

Members present: Robert Ambrogi, Chair, Massachusetts Newspaper Publishers' Association designee; Loretta Lillios, Attorney General's designee; and Maureen Valente, Massachusetts Municipal Association designee

Members absent: Rep. Peter Kocot, Chairman of the Joint Committee on State Administration and Regulatory Oversight, and Sen. Kenneth Donnelly, Chairman of the Joint Committee on State Administration and Regulatory Oversight

Attorney General's Staff present: Amy Nable, Assistant Attorney General, Director, Division of Open Government; Jonathan Sclarsic, Assistant Attorney General, Division of Open Government; Hanne Rush, Assistant Attorney General, Division of Open Government; Laurie Zivkovich, Legal Analyst, Division of Open Government; Kevin Sarro, Legal Intern, Division of Open Government; and Sean Tierney, Legal Intern, Policy & Government Division

Others present: Matthew L. Hartman, Esq., Legal Counsel, Office of Senator Kenneth Donnelly; Linda Segal, Wayland, MA; Katie McCue, Massachusetts Municipal Association; David Rosenberg, Norfolk, MA; Michael Sandman, Brookline, MA; Joanna Baker, Brookline, MA; George H. Harris, Esq., Wayland, MA; and Daniel Lieber, Wakefield, MA

Chair Robert Ambrogi called the meeting to order at 10:09 AM.

Mr. Ambrogi introduced Maureen Valente, the newest member of the Commission and Sudbury Town Manager.

Review and Approval of Draft Meeting Minutes from February 13, 2013 – Ms. Lillios moved to adopt the draft meeting minutes from February 13, 2013, seconded by Ms. Valente. There was no discussion. **With unanimous consent, minutes approved.**

Report from the Attorney General's Division of Open Government, Regarding the Open Meeting Law and the Activities of the Division of Open Government

Amy Nable introduced Laurie Zivkovich, who has taken Philip Mantyla's position in the Division of Open Government.

Ms. Nable provided the report on behalf of the Division. Since the last Commission meeting, the Division has issued 63 determinations and currently is on track to issue about 160 this year. It has declined to review 11 complaints, and it closed 38 cases where the complainant filed with the public body but did not follow up with a complaint with the Division. There are 128 open complaints, 52 of which were received since the last Commission meeting. The Division has participated in nine trainings since the last OMLAC meeting. There were four regional trainings, which were held in Ayer, Waltham, Greenfield and Springfield, and reached more than 200 people, and five other trainings, including for the Massachusetts Association of Contributory Retirement Systems and the MMA New Select Board Member Training.

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The Division has responded to more than 950 inquiries by phone and email since the last Commission meeting. The top categories of questions received are Notice – General Procedures; Notice – Agenda; Meetings – Definition Of; and Public Body – Definition Of. The Collective Bargaining FAQ is drafted, and the expectation is to issue it within the next month.

Mr. Ambrogio asked if there still is an outstanding possible enforcement matter. Ms. Nable confirmed that all pending intentional violation matters have been resolved, and the Division has not had to bring any court actions.

Status of Bills Pertaining to the Open Meeting Law Recently Filed in the Legislature

Ms. Nable reported that all bills have been assigned and there are no scheduled hearings.

Matthew Hartman confirmed that there are no scheduled hearings.

Correspondence Received

Michael Sandman e-mail - Regarding participation by members of public bodies in online communities: Michael Sandman addressed the Commission regarding his e-mail urging consideration of amending the Open Meeting Law (the “Law”) to allow participation by members of public bodies in online communities/social networking sites. Mr. Sandman summarized his current participation on a local school budget subcommittee in Brookline, a Facebook group page that has been created with over 700 members, the great deal of comment from the group members, the public body’s request to town counsel for approval of the practice, and town counsel’s response that if a quorum of the public body comments there would be a violation of the OML. Mr. Sandman commented that while the subcommittee members do pay attention to the OML, the OML gets in the way of providing information to the public. One of the proposed bills may make it possible to comment in this way. While he realizes that not everyone has access or wants an online account, he supports some electronic accommodation in the OML.

Ms. Lillios acknowledged that this issue is one that this Commission has spoken about repeatedly. She expressed her concern for equal access especially in areas of the Commonwealth where access alone is not a foregone conclusion. She would like to keep an open mind and would like to know what other jurisdictions are doing in this area. One suggestion would be to ask the Division to research what other states are doing while its summer interns are available to assist.

Ms. Valente noted that while she is new on the Commission, she knows from being a town official that public bodies wrestle with this issue all of the time. Towns and cities, and not individuals, should host the site, and rules need to be set up. Even when cities or towns are the host, she has concerns about everyone having access to the information. She agrees the issue needs to be looked at more closely.

Mr. Ambrogio expressed his continued fear that a lot of citizens do not have regular internet access or are not internet savvy. At the same time, the trend is moving toward the inevitable. He supports Ms. Lillios’s suggestion about the Division doing research if the Division is up to the task. While he personally hasn’t seen anything regarding other states, some sort of memorandum regarding other states would be useful.

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Ms. Lillios clarified that she would not be looking for a comprehensive survey on every state but an identification of states that have considered this issue and what they decided.

Ms. Nable confirmed that the Division will work on this request and report back at the next meeting.

David Rosenberg commented that this situation almost identically matches the situation of House bill 2908. In a number of respects, Massachusetts is a leader. There is a danger of waiting for other states and following instead of leading.

Joanna Baker e-mail - Regarding online public forums: Joanna Baker addressed the Commission, stating that while she and Mr. Sandman are from the same community, they had never met until now. Participants interested in the Brookline school issue are not just parents; it's a community issue. Ms. Baker stated that she does not prefer Facebook, and she is encouraged by hearing the suggestion that municipalities host online public fora themselves. She agrees with the idea of looking to other states, but does not agree with waiting to see what others will do. With respect to access, she assumes that every public library in Massachusetts has internet access, and this overcomes the access objection. Designers of a municipally sponsored forum can take into account that there is no need for fancy graphics, and they can design something simple that any connection can access. Finally, her suggestion for increased use of on-line participation by the public addresses education, participation by the elderly, those who can't drive at night or don't like public transportation, and time limits for speaking at meetings. Ms. Baker stated that the current interpretation of the Open Meeting Law (the "OML") is actually thwarting participation. She thanked the Commission for the opportunity to speak to the members, reiterating the benefits of asynchronous contribution on an internet site with an open and close date.

Mr. Ambrogi agrees that physical meetings can exclude individuals' attendance but does not agree that having internet access solves the problem. Many with access are not sophisticated enough to navigate an internet site. Municipalities hosting the site may help. Ms. Baker commented on the growing voice of seniors and computer training available at senior centers. Mr. Ambrogi emphasized that nothing in the law prohibits members from reading and knowing what is going on; they just can't comment. Mr. Sandman stated that is the issue because while many comments are rational and thoughtful, they often contain misinformation and discussions are distorted. It can be a problem if members of an official body cannot correct misinformation. He would like ability to correct or designate someone who can correct misinformation.

Ms. Lillios stated that while the issues were presented very well today, they need to be weighed carefully. In terms of public access, she is not prepared to assume library access exists across the Commonwealth.

Linda Segal inquired if anonymous posting, which she disfavors, is envisioned. Ms. Valente replied that city-hosted sites require a login with a name. Mr. Sandman commented that individuals have to identify themselves at meetings. Mr. Ambrogi stated that anonymity is a big question for newspapers, but it is a question outside of the OML. Mr. Rosenberg commented that the OML doesn't address what happens at a meeting, and House bill 2908 doesn't address

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that issue. His assumption is that rules similar to rules at meetings would be followed. It would be whatever prevails. Ms. Baker suggested that the Attorney General's Office might consider trying a couple of "trial runs" in a few municipalities, allowing this type of online meeting to occur. Ms. Lillios stated that she is not prepared to make that recommendation. Mr. Ambrogi stated that to some extent the Attorney General's hands may be tied by the language of the law. Perhaps there should be a commission to study this to come up with a comprehensive proposal. He looks forward to getting the research at the next meeting

Michelle Bailey e-mail – Regarding consideration of items not listed on a meeting notice and Chair responsibility: Michelle Bailey was not present. Mr. Ambrogi read aloud her e-mail in which she asks what the responsibility of a chair is to solicit topics in advance of a meeting. Ms. Nable stated that the Division addresses this issue during trainings. The chair must make a good faith effort to determine what the body will discuss during a meeting. If violations are alleged, the Division will look at efforts made and if the chair actively sought not to anticipate topics. The Division's general interpretation is that if the topic is not reasonably anticipated, it is okay to discuss it but the Division encourages postponement.

George Harris e-mail – Regarding creation of compiled evaluations relating to professional competence and distribution to members of a public body in advance of a meeting, and reconsideration of Attorney General decisions: George Harris introduced himself as a Wayland resident, attorney, and a former three-term selectman. He thanked the Commission and commended the Division for its work. He expressed his disagreement with the Division's determination in OML 2013-5 and the Division's written response declining to revise the determination after his motion for reconsideration. Mr. Harris noted that this is not a criticism of the Division's work but a concern about policy and the rationale used. Mr. Harris summarized the Open Meeting Law (the "OML") provisions regarding discussions of professional competence, the Division's advice on its website, the Division's FAQ regarding evaluations, the facts of OML 2013-5, the Supreme Judicial Court case *District Attorney for the Northern District v. School Committee of Wayland*, his belief that the objective of the OML is not improvement of operational efficiency, and the effect of the determination being that the board members know everything before the meeting and the public does not see debate and discussion in its original form. He posed a hypothetical example of a hiring process used by a public body to select the next town administrator. He summarized the Division's position that it will not revise a determination based on a disagreement with interpretation of the law but only where the request identifies a clerical or mechanical error in the determination or a significant legal or factual issue that the Division may have overlooked or misapprehended in resolving the complaint. His position is that the Division should try to explain why his rationale is wrong as he thinks a court would do that, and for educational purposes the Division should provide explanation if it wants to educate members of government and the public. Mr. Harris stated that on another matter of reconsideration, he has been waiting now four months to hear back from the Attorney General. While he knows that the Office is busy and understaffed, reconsiderations seemingly should be done relatively quickly since the research is done. He thanked the Commission.

Mr. Ambrogi asked Mr. Harris why the reasoning spelled out in the determination does not suffice. Mr. Harris said he would like more explanation as to why he is wrong. Mr. Ambrogi

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stated that the Commission is an advisory body; it can provide advice to Attorney General's Office on policy and legislation. He asked Mr. Harris what he would see this Commission as doing. Mr. Harris said he'd like to know where he is wrong. He appreciates three registered voters can go to court, but that is not a good option. Regarding reconsiderations, it is not clear under what circumstances the Division will reconsider. Simply disagreeing should not be a reason for denial.

Ms. Lillios commented on the distinction between conducting a performance evaluation and the hiring process example given by Mr. Harris. She reads the documents as limited to conducting performance evaluations and sees ranking performance evaluations as a unique role. She also reads the standard in the letter from the Attorney General's Office declining reconsideration as the standard used by the Massachusetts Appeals Court, although there are no citations. She noted that there is the option of litigation.

Ms. Valente had no comment as she still is familiarizing herself with the issues.

Ms. Nable stated that the Division's legal reasoning is spelled out in the decision and an FAQ. The standard for reconsiderations is similar to Appellate Court Rule 27. Mr. Ambrogi inquired if the reconsideration standard is in the regulations or on the website. Ms. Nable replied it is not. As noted by Mr. Harris, it is not a statutory right, but the Division does try to respond as soon as possible. Mr. Harris commented that there is no legal reasoning in the FAQ; it simply says what the Division allows. Mr. Ambrogi commented that there is a limit as to what this Commission can do. If in theory it thought that the Attorney General was wrong, that would be a substantive discussion he would not be prepared to get into. If Mr. Harris feels wronged, his ultimate recourse is to go to the courts.

Public Comment

David Rosenberg commented on House bill 2908, noting that before it was a bill, he wrote an executive summary, an FAQ, and a rationale. He has made some edits and is happy to send them to anyone requesting copy. Further, although adamantly supporting House bill 2908, he has noticed some imperfections in his drafting and he would like to address them when it comes up for a hearing.

Daniel Lieber commented that the Open Meeting Law (the "OML") is not about participation but attendance and visibility. At public meetings, he only has the ability to talk at the discretion of the chair. The ability to watch is different from active participation. Technology allows individuals to be involved in the discussion without being part of the decision process. The Commission needs to consider allowing this communication. More visibility serves the purpose of the OML. The spirit of the OML has been followed by most, but not all. As he has read decisions, deliberate ignorance the OML and implementation of the OML is not as uncommon as he would hope. Finally, he stated that the Division needs help. Everyone works hard, but only one decision has been issued within 90 days and the average decision takes more than nine months, which is unconscionable. Mr. Lieber suggested that the Commission can recommend to the Legislature a revision to the law or additional funding. Mr. Lieber commented that the cost for appellate review is over \$3,000. If a person or three citizens go to the courts and prevail,

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costs should be reimbursed. He hopes the Commission will make that recommendation. He thanked the Commission.

Mr. Ambrogi stated that personally he agrees about the need to revise the law to have ability to award costs and attorney fees. He thinks it may be addressed in House bill 2786. The Commission has discussed this but has never voted or reached a consensus. With respect to online discussions, his fear is that there will be deliberation, and issues will be decided by the time members get to the meeting. Mr. Sandman stated that they are looking for members of public bodies being able to comment in response to public comment. The internet is far more open than nighttime meetings at town hall. He takes issue with Mr. Ambrogi's comment, stating it will be exactly opposite - making more discussion more available. Ms. Lillios commented on considering, as the Commission moves forward, the internet against the value of cable television. Mr. Ambrogi reiterated that today demonstrates that it is incumbent on the Commission to come up with some recommendation. Ms. Nable noted that Section 4 of House bill 2786 does propose reimbursement of fees and costs by the public body. Mr. Ambrogi stated that it would be helpful to the public if the Division formalized its reconsideration process.

Items Not Reasonably Anticipated by the Chair 48 Hours in Advance of the Meeting

There were no items.

Schedule Next Meeting

The Commission discussed holding the next meeting in September or October, with the specific date to be determined.

Ms. Lillios moved to adjourn the meeting, seconded by Ms. Valente. **With unanimous consent, the meeting adjourned at 11:34 AM.**

List of Documents Used by the Commission at the Meeting

1. Meeting Notice for June 18, 2013
2. Draft Meeting Minutes for February 13, 2013
3. Division of Open Government Update for OMLAC – 6/18/13
4. H. 2786: *An Act To Improve The Open Meeting Law*
5. H. 2843: *An Act To Exempt The Deliberation Of Public Bodies At Town Meeting From The Open Meeting Law*
6. H. 2908: *An Act To Enhance Technology In Civic Engagement*
7. H. 2817: *An Act Relative to the Open Meeting Law*
8. S. 975: *An Act Further Regulating Town Meeting Notices*
9. Michael Sandman e-mail dated April 18, 2013
10. Joanna Baker e-mail dated April 23, 2013
11. Michelle Bailey e-mail dated May 15, 2013
12. George Harris e-mail dated June 11, 2013
13. OML 2013-5 determination, dated January 16, 2013
14. Attorney General's response to request for reconsideration of OML 2013-5, dated June 3, 2013

Approved: September 10, 2013